Editor's note: Appealed -- reversed & held not barred by laches, Civ.No. 93-646 TUC ACM (D.Ariz. Jan. 4, 1995); appeal filed, No. 95-15889 (9th Cir. May 1, 1995), aff'd in part, rev'd in part, remanded 99 F.3d 344 (9th Cir., Oct. 31, 1996),

UOP

IBLA 91-78 Decided August 9, 1993

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring the HAT 1-39 placer mining claims null and void ab initio. AMC-294064 through AMC-294102.

Affirmed.

1. Mining Claims: Lands Subject To--Mining Claims: Location

   A decision declaring a mining claim null and void ab initio will be affirmed where the lands embraced in the claim were reconveyed to the United States in a state land exchange pursuant to sec. 8 of the Taylor Grazing Act subject to a reservation of the mineral estate.

2. Exchanges of Land: Generally--Res Judicata--State Exchanges: Generally--State Exchanges: Lands Subject To

   Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

APPEARANCES: Ralph B. Sievwright, Esq., Phoenix, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

UOP, a General Partnership, appeals a November 2, 1990, decision of the Chief, Branch of Mining Law Administration, Arizona State Office, Bureau of Land Management (BLM), declaring the HAT 1-39 placer mining claims (AMC-294064 through AMC-294102) null and void ab initio. BLM

declared the mining claims void "because the BLM public records show the lands were not open to location of mining claims at the time of location." The United States acquired the surface estate of the subject lands from the State of Arizona by Deeds of Reconveyance dated April 18, 1947, and September 3, 1948, pursuant to land exchanges made under section 8 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1272, as amended by Act of June 26, 1936, ch. 842, 49 Stat. 1976 (formerly codified at 43 U.S.C. § 315g (1970)). 1/ The deeds contain a reservation of the minerals to the grantor, the State of Arizona. BLM thus concluded the lands were not subject to location under the mining laws because the United States has no mineral ownership in the lands (Decision at 2).

On appeal, UOP argues that the mineral reservation in the deeds of reconveyance is invalid and, hence, title to the minerals passed to the United States. Appellant contends the lands were nonmineral in character at the time of reconveyance. Further, appellant urges that there was no statutory authority for reservation of the minerals in an exchange based on equal acreage under section 8 of the Taylor Grazing Act unless the lands were determined to have been mineral in character. Relying on Phelps Dodge Corp. v. State of Arizona, 548 F.2d 1383 (1977), cert. denied, 434 U.S. 859 (1977), appellant contends that because the land was not mineral in character at the time of the exchange, the United States had no statutory authority to accept the mineral reservation as an encumbrance on title (UOP's Statement of Reasons (SOR) at 2-7). Further, relying on the court opinion in Phelps Dodge Corp. v. State of Arizona, supra at 1387-88, appellant also insists that under State law the State of Arizona at the time of exchange had no authority to convey land which was mineral in character with a mineral reservation, rather it only had authority to lease such land (SOR at 2-7).

BLM in response to appellant's SOR argues inter alia that the Board has no jurisdiction to determine the authority of the State of Arizona to reserve minerals in the conveyancing document, that the State is an indispensable party and has not been joined in this action, and that a decision by the Board in favor of appellant would create a substantial cloud on settled land titles. BLM points out that there has been no showing that the lands were not mineral in character at the time of the exchange deeds, rather there is documentation in the record which supports a mineral in character finding. In this regard, Phelps Dodge is asserted to be distinguishable. To the extent the mineral reservation is asserted to be invalid on the basis of limitations of State authority arising from State statute, BLM contends the Board, as distinguished from the Phelps Dodge court, is without authority to alter the terms of the conveyance from the State.

In a reply brief, appellant acknowledges that it owns mineral leases issued by the State covering the land embraced in the mining claims and that it filed the mining claims to protect its interest in the mineral

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1/ 43 U.S.C. § 315g was repealed by section 705(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792, effective Oct. 21, 1976.

deposit in light of the Phelps Dodge decision. Appellant contends the Board has jurisdiction to determine whether the lands were mineral in character at the time of the exchange and to determine whether the provisions of the Taylor Grazing Act were properly interpreted by BLM.

[1] The law is well settled that lands patented without a reservation of minerals are not subject to the location of mining claims under the mining laws of the United States, 30 U.S.C. § 22 (1988), and a mining claim located on such lands is properly declared null and void ab initio. See, e.g., Ariel MacDonald, 52 IBLA 384 (1981). Similarly, with respect to lands which have been reconveyed to the United States subject to a reservation of minerals, we have held that the lands are unavailable for location of mining claims and, hence, claims located thereon are properly held to be null and void ab initio. August F. Plachta, 88 IBLA 304, 306 (1985); Moise & Leon Berger, 82 IBLA 253 (1984); John F. Pasak, 71 IBLA 334 (1983). 2/

[2] Appellant is challenging before the Board the validity of the mineral reservation in the deed of reconveyance by which the United States acquired title in the exchange. In essence, appellant is challenging the land exchange itself. Regulations in effect at the time required the publication of notice in a newspaper of general circulation in the counties in which the lands involved are located. 43 CFR 147.12 (1938). 3/ The stated purpose of this requirement was to allow persons having a bona fide objection to the exchange to file their protest in the district land office or the General Land Office. Id. Subsequent to filing of proof of publication of notice, any protests filed against the exchange are considered and decided. 43 CFR 147.13 (1938). The BLM decisions approving the exchange applications at issue here reflect that there were "no protests or contests of record" in the case of Phoenix 080893 (Exh. F to BLM Response to Appellant's Reply) and "no protests of record" in the case of Phoenix 080687 (Exh. C to BLM Response to Appellant's Reply). In the absence of a protest and a timely filed appeal from the decision thereon, approval of the exchange applications must be considered final Departmental action under the doctrine of administrative finality, the administrative counterpart of res judicata. See Lloyd D. Hayes, 108 IBLA 189 (1989).

2/ Absent legislative provisions to the contrary, patented lands which are reacquired by the United States are properly distinguished from public domain or public lands and are not subject to the public land laws. Bobby Lee Moore, 72 I.D. 505, 510 (1965), aff'd sub nom. Lewis v. General Services Administration, 377 F.2d 499 (9th Cir. 1967); see Thompson v. United States, 308 F.2d 628, 631-33 (9th Cir. 1962); Rawson v. United States, 225 F.2d 855 (9th Cir. 1955). Section 8 of the Taylor Grazing Act, however, provided that "lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands." 48 Stat. 1272.

3/ Copies of affidavits of publication in local newspapers of notice of the exchanges at issue here have been provided for the record.

We note that were we to undertake a review of the validity of the mineral reservation in the reconveyance, we would find the Phelps Dodge case less compelling than appellant argues in the context of the present case. The Taylor Grazing Act exchange considered in Phelps Dodge was an "equal acreage" exchange with the State of Arizona in which the lands were reconveyed subject to a mineral reservation. 548 F.2d at 1384. The court found that mineral reservations in "equal acreage" exchanges under section 8(c) of the Act were only authorized where the lands had been determined to be mineral in character and, since the lands involved were found by the court to be nonmineral at the time of the exchange, the reservation was held to be improper. 548 F.2d at 1387-88. The present case is distinguishable in that the record fails to disclose that the lands were found to be either mineral or nonmineral in character. The court in Phelps Dodge did not comment on the Departmental regulation approved by the Under Secretary on September 3, 1936. 43 CFR 147.7 (1938), 55 I.D. 403. In promulgating that regulation implementing the 1936 amendment of the exchange provisions of section 8
of the Taylor Grazing Act to allow state exchanges on an equal acreage basis, 4/ the Department concluded that it is not necessary in adjudicating an equal acreage exchange application to conduct an investigation of the mineral or nonmineral character of the selected lands where the state has applied for surface rights only and thus elected to receive the lands subject to a mineral reservation. 55 I.D. at 403-04. 5/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

4/ Act of June 26, 1936, ch. 842, 49 Stat. 1976-77.

5/ Otherwise the regulations applicable to an equal acreage exchange called for an investigation of the mineral character of the land unless that character was already known. 43 CFR 147.6 (1938).